Nos. 14-556, 14-562, 14-571 & 14-574

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IN THE
# Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL.,
PETITIONERS,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH,
ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,
v.
WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE,
ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.,
RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,
PETITIONERS,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,
RESPONDENTS.

**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF THE HUMAN RIGHTS CAMPAIGN AND 207,551 AMERICANS AS *AMICI CURIAE* SUPPORTING PETITIONERS*
## VOLUME I

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## INTEREST OF AMICI[1]

The Human Rights Campaign, the largest civil rights organization working to achieve equality for lesbian, gay, bisexual, and transgender people in the United States,[2] together with more than 200,000 Americans from across this country, respectfully submit this brief as amici curiae in support of Petitioners. Amici have come together for the sole purpose of urging the Court to reverse the Sixth Circuit's judgment below.

## STATEMENT

Forty-five years ago in Minneapolis, two gay men sought a license to marry each other. Not surprisingly, their request was denied. To everyone but them, the recognition that they sought was utterly unthinkable at the time. Following the denial of their appeal by the Minnesota Supreme Court, this Court, under its then mandatory appellate jurisdiction, dismissed the

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[1] Pursuant to Supreme Court Rule 37.3, amici curiae certify that counsel of record of all parties received timely notice of the intent to file this brief in accordance with this Rule and they have consented to the filing of this brief. Pursuant to Rule 37.6, amici also certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to its preparation or submission. A description of the method by which names of amici were collected is included as Appendix B. A complete list of amici is included as Appendix C.

[2] Although laws forbidding same-sex marriage fall most directly and onerously on gay people, it should be noted that to the extent a bisexual or transgender person seeks to marry a person of the same sex, these laws would also harm them. This brief generally uses the word "gay" to refer to anyone in the LGBT (lesbian, gay, bisexual, and transgender) community who might seek to marry a person of the same sex.

appeal for "want of a substantial federal question." *Baker* v. *Nelson*, 409 U.S. 810, 810 (1972).

Fourteen years later, in 1986, in a case brought by a "practicing homosexual," this Court upheld the constitutionality of a Georgia statute that made it a crime for a gay person to engage in certain consensual acts of sexual intimacy, prescribing a sentence of "imprisonment for not less than one nor more than 20 years." *Bowers* v. *Hardwick*, 478 U.S. 186, 188 n.1 (1986). In upholding that law, the *Bowers* Court dismissed the plaintiff's argument as "at best, facetious," *id.* at 194–95, even as the dissent cautioned that "[n]o matter how uncomfortable a certain group may make the majority of this Court, . . . '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'" *Id.* at 212 (Blackmun, J., dissenting) (second alteration in original) (quoting *O'Connor* v. *Donaldson*, 422 U.S. 563, 575 (1975)).

Seventeen years later, the Court revisited the issue in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), this time striking down a Texas statute under the Due Process Clause and explaining that *Bowers* "misapprehended the claim of liberty there presented to it." *Id.* at 567. Acknowledging that *Bowers* had provided "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres," *id.* at 575, the Court in *Lawrence* could not have been more emphatic: "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 578. In overruling *Bowers*, the Court observed a fundamental truth about human nature: "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures,

persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579.

Times truly can blind. Within the lifetimes of most Americans, it would have been inconceivable to any gay person, almost anywhere in this country, that they would be able to "affirm their commitment to another before their children, their family, their friends, and their community" through civil marriage. *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013). "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Id.*

How did this change happen and why so fast? What cured the "blindness" of prior generations in failing to see that their gay brothers, sisters, colleagues and neighbors have the same human need for love and commitment as everyone else? In large part, the reason for this "sea change" in attitudes toward gay people, Transcript of Oral Argument at 106–09, *United States* v. *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), is the fact that until recently, many Americans simply did not realize that they knew anyone who was gay. Because of the sting of social disapproval and the persistence of discrimination in nearly every facet of everyday existence, for most of the twentieth century and continuing even today, many gay people have lived their lives "in the closet" so as not to risk losing a job, a home, or the love and support of family and friends. And without the benefit of knowing and understanding the lives of gay people living openly and with dignity in their communities, many Americans failed to see that gay people and their

families have the same aspirations to life, liberty, and the pursuit of happiness as everyone else.

Over time, as more gay Americans "came out" to their family and friends, the "limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen . . . as an unjust exclusion." *Windsor*, 133 S. Ct. at 2689. Perhaps the paradigmatic example of this phenomenon is the experience of the Senator from Ohio, Rob Portman, who supported the Ohio marriage bans at issue in this case based on his "faith tradition that marriage is a sacred bond between a man and a woman," but then changed his mind upon learning that his own son is gay. Rob Portman, *Gay Couples Also Deserve Chance To Get Married*, Columbus Dispatch, Mar. 15, 2013, at A17.

The continuing exclusion of gay couples from civil marriage is itself a manifestation of this principle that "times can blind us to certain truths." *Lawrence*, 539 U.S. at 579. Today, we can see that discrimination against gay people in civil marriage—whether it takes the form of a statute limiting marriage to straight couples, a state law refusing to recognize the valid marriages of gay couples from out of state, or a state constitutional amendment mandating the exclusion of gay couples from marriage—"once thought [to be] necessary and proper," really "serve[s] only to oppress." *Id.* at 579.

## ARGUMENT

This Court recognized and reinforced this greater understanding of gay people and their lives in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), which held that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. Since *Windsor*, more

than forty federal district court opinions and four circuit courts have held that the U.S. Constitution requires that gay people be allowed to marry, *see Marriage Litigation*, Freedom to Marry, http://www.freedomtomarry.org/litigation/ (last visited Feb. 18, 2015); only one federal circuit court and two district courts have held to the contrary.[3] This remarkable degree of consensus among the courts is no coincidence—it is based on "the beginnings of a new perspective," *Windsor*, 133 S. Ct. at 2689, and is mandated by the logic of *Windsor* itself, which enshrines the unique protections our Constitution affords minority groups from discriminatory treatment.

At the heart of *Windsor* is the principle that gay people have dignity, and that the Constitution mandates that this dignity be respected equally under the law. *See, e.g.*, *id.* at 2696 (DOMA "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and *dignity*." (emphasis added)); *id.* at 2693 ("[I]nterference with the *equal dignity* of same-sex marriages . . . was more than an incidental effect of [DOMA]." (emphasis added)). The Court reiterated in *Windsor* that laws that discriminate against gay people based on a "bare . . . desire to harm," *id.* at 2693 (quotations omitted), or merely a "want of careful, rational reflection," *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring), about other people's human dignity are

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[3] *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014); *Conde-Vidal* v. *Garcia-Padilla*, — F. Supp. 3d —, No. 14-cv-1253, 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux* v. *Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

inconsistent with the principles of due process and equal protection guaranteed to all Americans by the Constitution. *See Windsor*, 133 S. Ct. at 2693–94; *see also Romer* v. *Evans*, 517 U.S. 620, 634–35 (1996); *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446–48 (1985); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534–35 (1973).

The "design, purpose, and effect of [a challenged law] should be considered as the beginning point in deciding whether it is valid under the Constitution." *Windsor*, 133 S. Ct. at 2689. In the context of laws that discriminate against a class of persons, this Court has held that the constitutional term known as "animus" constitutes an impermissible basis for legislation under the Equal Protection Clause. *Id.* at 2693–94; *Romer*, 517 U.S. at 632–35; *see also City of Cleburne*, 473 U.S. at 448; *Moreno*, 413 U.S. at 534–35. At times using the word "animus," *see, e.g.*, *Romer*, 517 U.S. at 632, at times using other words or phrases like "negative attitudes," "fear," "bias," or the "bare . . . desire to harm a politically unpopular group," the Court has made it clear that it will set aside laws the very purpose of which is to discriminate against a group of citizens simply because of who they are. *See Cleburne*, 473 U.S. at 448–50; *Palmore* v. *Sidoti*, 466 U.S. 429, 432–33 (1984); *Moreno*, 413 U.S. at 534–35.

In order to find that a law reflects such constitutionally impermissible animus, it is not necessary for a court to conclude that animus was the only motivating factor for the law, or that the law's supporters were subjectively prejudiced, bigoted or homophobic. *See Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–67 (1977) (plaintiff not required to prove challenged action "rested solely . . . on discriminatory purposes"; court

may look to "circumstantial" evidence such as "effect of the state action" and "historical background"). While one of the dictionary definitions of the word "animus" is "a usually prejudiced and often spiteful or malevolent ill will," *Animus Definition*, Merriam-Webster Online Dictionary, http:// www.merriam-webster.com/dictionary/animus (last visited Feb. 18, 2015), a subjective inquiry into legislator or voter "malevolence" is not required for purposes of constitutional jurisprudence. This Court did not find that the citizens of Colorado who voted for Amendment 2 in *Romer*, or that the members of Congress who supported DOMA in *Windsor* were individually prejudiced, bigoted or motivated by hatred and ill will. *Windsor*, 133 S. Ct. at 2693–94; *Romer*, 517 at 634–35. The very fact that there was substantial objective evidence of unconstitutional animus directed toward gay people was enough. *Windsor*, 133 S. Ct. at 2693–94. That makes sense since no human being can ever know what was in the heart or mind of another. *Windsor* makes it clear that such an intrusive inquiry is not only unnecessary, but beside the point.

In addition to the presence of "a bare desire to harm," animus can also be present when there is an "unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7–8 (1976). "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*,

531 U.S. at 374 (Kennedy, J., concurring). Thus, when a classification has been chosen "'because of,' [and] not merely 'in spite of,' its adverse effects upon an identifiable group," a court must determine whether the statute serves some purpose beyond a mere desire to harm the targeted group. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

While this Court has never attempted to catalogue systematically all the circumstances that indicate the existence of constitutionally impermissible animus, there are several objective factors that have been considered by this Court to be relevant. They include: (1) the law's text; (2) the political and legal context of its passage, including the legislative proceedings and history and evidence that can be gleaned from the sequence of events that led to passage; (3) the law's real-world impact or effects; and (4) the government's failure to offer legitimate objectives for the law along with means that truly advance those objectives. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693–94; *Romer*, 517 U.S. at 634–35; *Cleburne*, 473 U.S. at 448; *Arlington Heights*, 429 U.S. at 266–68; *Moreno*, 413 U.S. at 536–38. As discussed below, because each and every one of these factors is present here, there is more than sufficient basis for this Court to conclude that the design, purpose, and effect of the laws at issue in Kentucky, Michigan, Ohio, and Tennessee are "not to further a proper legislative end but to make [gay people] unequal to everyone else." *Romer*, 517 U.S. at 635.

## I. The Text of the Laws

Impermissible animus is evident in the plain language of the laws at issue themselves.[4] Tennessee, for example, asserts the importance of "the family as essential to social and economic order," but then specifically excludes gay families as if gay couples were not just as capable as straight couples of functioning as families. Tenn. Code Ann. § 36-3-113(a); *see* Brian Powell et al., *Public Opinion, the Courts, and Same-Sex Marriage: Four Lessons Learned*, 2 Soc. Currents 3, 5 (2015) ("The patterns here are unequivocal. Americans who oppose same-sex marriage typically do not count same-sex couples as a family.").

Similarly, the statutory language of Michigan's law prohibits marriages between gay people because Michigan has a "special interest" in promoting not only "the stability and welfare of society," but "children" as well:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote,

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[4] The text, legislative context, impact, and thin justifications with respect to the laws in Kentucky, Michigan, Ohio, and Tennessee are not materially different than those of other states' analogous laws that have recently been the subject of litigation. *See, e.g.*, *Baskin* v. *Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic* v. *Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen* v. *Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Campaign for S. Equal.* v. *Bryant*, --- F. Supp. 3d. —, No. 3:14-cv-818, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014); *Latta* v. *Otter*, 19 F. Supp. 3d 1054 (D. Idaho 2014); *Brenner* v. *Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014).

> among other goals, the stability and welfare of society and its children.

Mich. Comp. Laws Ann. § 551.1. This statutory language employs familiar tropes of characterizing gay people as "other," implying that recognizing gay relationships through marriage would not only threaten society and "the common good," but the next generation as well. *See, e.g.*, George Chauncey, *Why Marriage Became a Goal* 47 (2004) ("[A]nti-gay activists also played to voters' fears by reviving other demonic stereotypes of homosexuals . . . . [S]tates and cities [were flooded] with antigay hate literature that depicted homosexuals as sex-crazed perverts who threatened the nation's children and moral character.").

Not surprisingly, all four states (Kentucky, Michigan, Ohio, and Tennessee) legally characterize marriages between gay people as contrary to "public policy." Ky. Rev. Stat. Ann. § 402.040(2); Mich. Comp. Laws Ann. § 551.1; Ohio Rev. Code Ann. § 3101.01(C)(3); Tenn. Const. art. 11, § 18; Tenn. Code Ann. § 36-3-113(c). Tennessee's statute, for example, provides that "[a]ny policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee." Tenn. Code Ann. § 36-3-113(c). The Tennessee law further suggests that allowing gay couples to share in "the unique and exclusive rights and privileges" of marriage would somehow disrupt "the common good." Tenn. Code Ann. § 36-3-113(a).

Indeed, like DOMA itself, Ohio's constitutional amendment is actually called "the *Defense* of Marriage Amendment," *State* v. *Mays*, No. 99150, 2014 WL

888375, at *2 (Ohio Ct. App. Feb. 28, 2014) (emphasis added), and the analogous Tennessee amendment is called the "Tennessee Marriage *Protection* Amendment," Steven Hale, *Obama May Have Evolved on Same-Sex Marriage, but Most Tennessee Democrats Haven't*, Nashville Scene (May 17, 2012), http://www.nashvillescene.com/nashville/obama-may-have-evolved-on-same-sex-marriage-but-most-tennessee-democrats-havent/Content?oid=2872675 (emphasis added). This Court's observation in *Windsor* thus applies with equal force here: "[w]ere there any doubt of [DOMA's] far-reaching purpose [to express moral disapproval of gay people], the title of the Act confirms it: The Defense of Marriage." *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013).

Two of the four states whose laws are at issue explicitly define marriage by the class of people (gays and lesbians) who are excluded. Ky. Rev. Stat. Ann. § 402.020(1)(d) ("Marriage is prohibited and void . . . [b]etween members of the same sex."); Mich. Comp. Laws Ann. § 551.1 ("A marriage contracted between individuals of the same sex is invalid in this state."). This, of course, is entirely gratuitous since both the Kentucky and Michigan statutory codes already limit marriage to a man and a woman.

But that is not all. Adding insult to injury, the statutes explicitly refuse to give any legal effect to the marriages of gay couples validly entered into in other states. The Tennessee statute, for example, provides that: "If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state." Tenn. Code Ann. § 36-3-113(d). A Kentucky statute similarly articulates that state's refusal even to recognize the

divorce of a gay couple legally wed elsewhere: "(1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, *or its termination*, shall be unenforceable in Kentucky courts." Ky. Rev. Stat. Ann. § 402.045 (emphasis added).

These non-recognition provisions constitute novel departures from the states' traditional practice of recognizing marriages which were valid where celebrated. In Tennessee, for example, prior to the passage of the Tennessee "mini-DOMA," the standard recognition rule was to recognize any out-of-state marriage unless the relationship would have subjected one or both parties to criminal prosecution. *See, e.g.*, *Rhodes* v. *McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970). Prior to the passage of its "mini-DOMA," Michigan had adopted a version of the Uniform Marriage and Divorce Act which provides in pertinent part that "[a]ll marriages heretofore contracted by residents of this state [] who were . . . legally competent to contract marriage . . . are hereby declared to be and remain valid and binding marriages . . . ." Mich. Comp. Laws. Ann. § 551.271. Similarly, a Kentucky court had recognized an out-of-state marriage between a thirteen-year-old girl and a sixteen-year-old-boy even though that marriage would have been illegal in Kentucky. *See Mangrum* v. *Mangrum*, 220 S.W.2d 406, 407–08 (Ky. Ct. App. 1949). *See also Howard* v. *Cent. Nat'l Bank of Marietta*, 152 N.E. 784, 785 (Ohio Ct. App. 1926).

This longstanding principle of reciprocal marriage recognition, according to a leading conflict of laws treatise, "provides stability in an area where stability (because of children and property) is very important,

and it avoids the potentially hideous problems that would arise if the legality of a marriage varies from state to state." William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* § 119(a) (3d ed. 2002). These laws thus represent an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" from other states. *Windsor*, 133 S. Ct. at 2693. Laws like these, that do not fit "within our constitutional tradition," require "careful consideration to determine whether they are obnoxious to the constitution[]." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

Perhaps most importantly, the laws of three of the four states at issue further demonstrate impermissible animus in the sense that they go far beyond merely banning marriages between gay people. They also explicitly prohibit state and local governments from providing even specific, discrete benefits to gay couples in particular situations such as the right to make healthcare decisions for one's partner in case of medical emergency, or to participate as a family member in a state health insurance plan. Ky. Const. § 233A; Mich. Const. art. 1, § 25; Ohio Const. art. XV, § 11; *see also Opinion of the Attorney General*, Ky. Op. Att'y Gen., No. OAG 07-004, 2007 WL 1652597, at *10–11 (June 1, 2007) (finding that Ky. Const. § 233A renders unconstitutional certain state universities' health insurance coverage for "domestic partners" of faculty).

Ohio's constitution, for example, not only prohibits gay couples from marrying, but also prevents them from receiving any of the benefits available to married couples under any circumstances whatsoever: "This state . . . shall not create or recognize a legal status for relationships of unmarried individuals that *intends to*

*approximate the design, qualities, significance or effect of marriage.*" Ohio Const. art. XV, § 11 (emphasis added). The Michigan constitution bars any form, however limited or discrete, of "civil union" or other form of non-marital relationship recognition for gay people:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage *or similar union for any purpose.*"

Mich. Const. art. 1, § 25 (emphasis added); *see also* Ky. Const. § 233A ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.").

As a practical matter, what these provisions mean is that gay couples are permanently disabled from obtaining any meaningful form of recognition whatsoever for their families through the normal political process. *See, e.g.*, *Nat'l Pride at Work, Inc.* v. *Governor of Mich.*, 748 N.W.2d 524, 538–43 (Mich. 2008) (finding that Michigan amendment barred public employers from "providing health-insurance benefits to their employees' qualified same-sex domestic partners" in part because it "prohibits the recognition of unions similar to marriage 'for any purpose.'"). *But see* Minneapolis, Minn. Code tit. 7, ch. 142 (granting relationship recognition and benefits to "two non-married but committed adult partners"). By enshrining discrimination in the state constitution, these provisions have fixed the status quo of discrimination in stone, requiring another statewide referendum in order to change it. The same, of course,

was true for the Colorado amendment at issue in *Romer*: "Amendment 2 alters the political process so that a targeted class is [deprived of equal protection of the laws] . . . absent the consent of a majority of the electorate through the adoption of a constitutional amendment. . . . Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes." *Evans* v. *Romer*, 854 P.2d 1270, 1285 (Colo. 1993) (en banc); *accord Romer*, 517 U.S. at 631 (because of Amendment 2, gay and lesbian Coloradans' only form of redress was "enlisting the citizenry of Colorado to amend the State Constitution . . . .").

## II. The Historical and Political Context

The political, historical, and legislative background of a law is also significant to evaluating its validity under the Constitution. *See, e.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985) (zoning decision failed rational basis review because it "appears . . . to rest on an irrational prejudice" and "mere negative attitudes, or fear . . . are not permissible bases" for government action); *Palmore* v. *Sidoti*, 466 U.S. 429, 433–34 (1984) (reversing lower court's child custody decision, based solely on possible reactions to parents' race, because "[p]rivate biases may be outside the reach of the law, but the law cannot . . . give them effect"); *Plyler* v. *Doe*, 457 U.S. 202, 224–27 (1982) (holding state law unconstitutional and rejecting purported bases for law as irrational, concluding that "[t]he State must do more than justify its classification with a concise expression of an intention to discriminate."); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534–35 (1973) (holding federal statute unconstitutional under rational basis review

where legislative history demonstrated "a bare . . . desire to harm a politically unpopular group").

Part of determining whether animus may be driving particular government action against a minority group requires consideration of the historical treatment of that group. As this Court itself has recognized, gay men and lesbians in this country have been subject to long-standing discrimination. *See, e.g.*, *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute."); *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003) ("for centuries there have been powerful voices to condemn homosexual conduct as immoral"); *Bowers* v. *Hardwick*, 478 U.S. 186, 192–94 (1986) (describing history of laws in United States criminalizing consensual homosexual acts). "Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal." *Windsor* v. *United States*, 699 F.3d 169, 182 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). Even the Sixth Circuit recognized as much, noting "the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens." *DeBoer* v. *Snyder*, 772 F.3d 388, 413 (6th Cir. 2014). But "'[t]he past is never dead. It's not even past.' That is as true here as anywhere else." *Campaign for S. Equal.* v. *Bryant*, --- F. Supp. 3d. ---, No. 3:14-cv-818, 2014 WL 6680570, at *24 (S.D. Miss. Nov. 25, 2014) (quoting William Faulkner, Requiem for a Nun 92 (1951)). As a matter of both logic and common sense, this historical practice of discriminating against gay people cannot be divorced

from the reasons why these laws were enacted in the first place.

The political or legislative history of the law's passage is also relevant. The laws at issue here were all enacted during two periods approximately a decade apart. Most of the statutory provisions, dating from the period 1996–1998, were passed following the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993). *See* Ky. Rev. Stat. Ann. §§ 402.005, 402.020(1)(d), 402.040(2), 402.045 (all passed in 1998); Mich. Comp. Laws Ann. § 551.1 (passed in 1996); Tenn. Code Ann. § 36-3-113 (passed in 1996). Thus, like DOMA itself, these statutes, frequently referred to as "mini-DOMAs," were enacted "as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it." *Windsor*, 133 S. Ct. at 2682 (citing *Baehr*, 852 P. 2d at 44).

The state constitutional amendments, on the other hand, were generally enacted ten years later in response to similar developments after the Massachusetts Supreme Judicial Court's 2003 decision in *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), holding that limiting marriage only to straight couples violated the Massachusetts constitution. *See* Ky. Const. § 233A (2004); Mich. Const. art. 1, § 25 (2004); Ohio Const. art. XV, § 11 (2004); Tenn. Const. art. 11, § 18 (passed by the state legislature in 2004 and Tennessee voters in 2006). "In 2004 alone, thirteen states passed referenda barring same-sex marriage," referenda that were placed on the ballots to "inspire religious conservatives to vote [and] make gay marriage more salient in voter choices between political candidates[.]" Michael Klarman, *From the Closet to the Altar: Courts,*

*Backlash, and the Struggle for Same-Sex Marriage* 106 (2014). *See also DeBoer*, 772 F.3d at 408 ("[I]f there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about.").

This backlash to the *Goodridge* decision in Massachusetts is corroborated by the contemporaneous legislative record. A Kentucky State Senator, for example, explained that the state constitutional amendment introduced in 2004 would make it clear that "no one, no judge, no mayor, no county clerk, will be able to question [the citizens of Kentucky's] beliefs in the traditions of stable marriages and strong families." *Bourke* v. *Beshear*, 996 F. Supp. 2d 542, 551 n.15 (W.D. Ky. 2014). A Tennessee State Representative, one of the sponsors of the bill to amend the state constitution, similarly explained:

> [U]nfortunately we do have a State Supreme Court that doesn't mind messing with our Constitution and going against the will of the people and not including them in their decisions. And if we didn't have that kind of State Supreme Court here in Tennessee, and we have already seen it in Massachusetts, I would not be here with this piece of legislation.

*Hearing on HJR 24 [/SJR 31] Before the House Comm. on Children & Family Affairs*, 2005 Sess., 104th Gen. Assembly (Tenn. Feb. 16, 2005). And the State Senator who sponsored the constitutional amendment in Michigan explained that "the citizens of Michigan . . . want to decide the marriage issue, not leave it up to the extremist Massachusetts judges[.]" Senate Journal 92–69, Reg. Sess., at 1436–37 (Mich. 2004). Thus, as was the case with Amendment 2 in *Romer* v.

*Evans*, which was introduced after several Colorado towns had enacted laws prohibiting discrimination against gay people, 517 U.S. 620, 623–24 (1996), the laws at issue here were all passed in a backlash against perceived advances or potential advances in obtaining civil rights protections for gay people elsewhere.

The impetus behind the introduction of these laws came, at least in part, from the understanding that giving people the opportunity to express disapproval for gay people would drive voters to the polls. In Kentucky, for example, the incumbent United States Senator "began attacking gay marriage to rescue his floundering campaign." Klarman, *supra*, at 110. State party leaders called his opponent, a forty-four-year-old bachelor who opposed the federal marriage amendment, "'limp-wristed'" and a "'switch hitter,'" and "[r]eporters began asking him if he was gay." *Id.* Both the incumbent Senator and the state ballot measure barring gay couples from civil marriage were victorious. *Id.*

Many of the statements made by legislators or voters favoring these laws conveyed either negative code words or outright disparagement of gay people and their families. The primary sponsor of Ohio's constitutional amendment purposely misled voters with erroneous messages such as "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span." *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013). In 2004, the Ohio Secretary of State declared that "'the notion (gay marriage) even defies barnyard logic'" because "'the barnyard knows better.'"

Phillip Morris, *Blackwell Puts His Prejudice on Display*, Plain Dealer, Oct. 26, 2004, at B9 (alteration in original). In Tennessee, a State Representative declared: "'It'll be a sad day when queers and lesbians are allowed to get married.'" Beth Rucker, *Republicans Say Word 'Queer' Wasn't Best Choice to Describe Gays*, Assoc. Press, June 16, 2006. Meanwhile, a Kentucky State Representative asserted that "'marriage is a sacred institution, ordained by God and should only be between a man and a woman'" because "'[i]n the Garden of Eden, it was Adam and Eve, not Adam and Steve.'" Bruce Schreiner, *Fight Over Constitutional Amendment Looms in House*, Assoc. Press., Mar. 23, 2004. These statements regarding the supposed moral inferiority of gay people are strikingly similar to Congress' moral condemnation of gay people found in the legislative history of DOMA, which this Court concluded was based on animus. *Windsor*, 133 S. Ct. at 2693–94.

### III. The Impact of the Laws

A law can fail animus review when it "targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest." Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 94 (1997); *cf. City of Boerne* v. *Flores*, 521 U.S. 507, 533 (1997). In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996).

In *Windsor*, this Court emphasized that Section 3 of DOMA "touches many aspects of married and family life, from the mundane to the profound" and "divests married same-sex couples of the duties and

responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force." *United States* v. *Windsor*, 133 S. Ct. 2675, 2694–95 (2013).[5] The *Windsor* Court catalogued many of the key injuries wrought by DOMA: it "prevent[ed]" access to "government healthcare benefits"; "deprive[d]" gay couples "of the Bankruptcy Code's special protections"; "prohibit[ed]" gay couples "from being buried together in veterans' cemeteries"; rendered "inapplicable" protections for the family members of United States officials, judges, and federal law enforcement officers; "br[ought] financial harm to children of same-sex couples . . . [by] rais[ing] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses"; and "denie[d] or reduce[d] benefits allowed to families upon the loss of a spouse and parent, . . . [all of which] are an integral part of family security." *Id.*

It cannot be seriously disputed that these laws, by failing to grant equal rights and dignity to gay couples in Kentucky, Michigan, Ohio, and Tennessee, do exactly the same thing. Just as DOMA worked to "impose restrictions and disabilities" on gays and lesbians like Edith Windsor, the laws of these states alienate gay and lesbian couples from the scores of significant legal protections, "from the mundane to the profound," that the states provide to their straight married residents. *Id.* at 2692, 2694. These bans are

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[5] *See also* Transcript of Oral Argument at 71, *United States* v. *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) ("Justice Ginsburg: [I]t's—as Justice Kennedy said, 1,100 statutes, and it affects every area of life . . . [DOMA says there are] two kinds of marriage, the full marriage, and then this sort of skim milk marriage.").

arguably even broader in scope than Colorado's Amendment 2 in *Romer*—they affect hundreds of state laws and regulations governing nearly every aspect of a married person's daily life. An illustrative, though not comprehensive, list of some of the more significant rights and benefits is discussed below:

Taxes. Kentucky, Michigan, Ohio, and Tennessee authorize married couples to file joint tax returns. Ky. Rev. Stat. Ann. § 141.016(1); Mich. Comp. Laws Ann. § 141.641(2); Ohio Rev. Code Ann. § 5747.08(E); Tenn. Dep't of Revenue, *Guidance for Tennessee's Hall Income Tax Return*, http://www.state.tn.us/revenue/taxguides/indincguide.pdf (last visited Feb. 25, 2015). Filing joint returns allows couples to reflect their financial interconnectedness, obviating the unnecessary complication and expense of filing taxes as if they lived separate financial lives.

In Kentucky, petitioners Gregory Bourke and Michael Deleon, like Edie Windsor before them, do not want whoever of them is the surviving spouse to pay an inheritance tax when the other passes away, Ky. Rev. Stat. Ann. §§ 140.070, 140.080(1)(a), and thus lose a significant portion of the savings they have accumulated over their 31-year relationship, which they want to pass on to their two children. *Bourke* v. *Beshear*, 996 F. Supp. 2d 542, 546–47 (W.D. Ky. 2014).

Benefits for Public Employees. Although public employees in these four states are entitled to participate in generous state retirement plans or receive generous death benefits, some of the most favorable benefits under those plans are available only to the spouse of a retiree or deceased employee. *See, e.g.*, Mich. Comp. Laws Ann. § 38.31(2) (allowing employees to designate only spouses or other family members as beneficiaries); Ohio Pub. Emp. Ret. Sys.,

*Monthly Benefits*, https://www.opers.org/members/traditional/benefits/monthly.shtml (last visited Feb. 25, 2015) (limiting "qualified beneficiaries" to a surviving spouse, child, or dependent parent). And while public employees may also purchase health insurance for their families through a medical plan sponsored by the state, and an employee's spouse can join the plan, a gay partner is generally not allowed to do so. *See, e.g.*, Ohio Dep't of Admin. Servs., *State of Ohio Employee Benefits Guide 2013-2014* 7 (2013), *available at* http://das.ohio.gov/LinkClick.aspx?fileticket=Qq7ZC7W0XZg%3d&tabid=190 ("Examples of persons NOT eligible for coverage as a dependent include . . . Same-sex partners[.]"); Tenn. Dep't of Fin. & Admin., *2015 Eligibility and Enrollment Guide* 2 (2014), *available at* http://www.tn.gov/finance/ins/pdf/2015_guide_lg.pdf (only an employee's legal spouse or children are eligible for plan health care coverage and "a marriage from another state that does not constitute the marriage of one man and one woman is 'void and unenforceable in this state'").

In Tennessee, Dr. Valeria Tanco and Dr. Sophia Jesty, who were legally married in their then-home state of New York and who both now work for the University of Tennessee, would like to save money by combining their respective health insurance plans into a single family plan covering both of them as well as their baby daughter. The University, however, only allows married spouses to share family insurance coverage, and does not recognize them as married. Univ. of Tenn., *2015 Insurance Annual/Open Enrollment Transfer* (2015), *available at* http://insurance.tennessee.edu/2015%20AE%20Employee%20Letter.pdf; *Tanco* v. *Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014).

Family and Parenthood. Gay couples are raising children together in Kentucky, Michigan, Ohio, Tennessee, and every other state in the Union. Yet legal barriers to the recognition of the relationship between gay parents, and between gay parents and their own children, deprive them of many significant rights and protections under state law. Kentucky, Michigan, and Ohio all prohibit gay partners from adopting children, as unmarried couples are not allowed to jointly adopt children in these states. Ky. Rev. Stat. Ann. § 199.470(2); Mich. Comp. Laws Ann. § 710.24; Ohio Rev. Code Ann. § 3107.03(A).

The Michigan case actually began because petitioners April DeBoer and Jayne Rowse both wanted to be able to jointly adopt the three children they are raising together, but were unable to do so because Mich. Comp. Laws. Ann. § 710.24 only allows married couples to adopt jointly. *DeBoer* v. *Snyder*, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014).

Healthcare Decisions. In Kentucky and Ohio, the law presumes that only spouses and family members are qualified to make medical decisions on behalf of one another. Ky. Rev. Stat. Ann. § 311.631(1) (in the absence of an advance healthcare directive, only a patient's legal or judicially appointed guardian, attorney-in-fact, legal spouse, or relative are authorized to make decisions); Ohio Rev. Code Ann. § 2133.08(B) (in the absence of an advance healthcare directive, only a patient's legal guardian, legal spouse, or relative may be appointed as surrogates). A similar, though less absolute presumption exists in Michigan and Tennessee. Mich. Comp. Laws Ann. § 700.5313(3)–(4) (in the absence of an advance health care directive, an incapacitated person's spouse is first in line to be a guardian capable of making medical

decisions, and a non-relative cannot be appointed if a child, parent, or other relative is available); Tenn. Code Ann. § 68-11-1806 (same). Gay people are thus left without the security of having their spouse act on their behalf if they are incapacitated, even though one's spouse is often the best-qualified person to make such critical medical decisions.

Probate and Transfer of Assets. Estate law in each of the four states protects and provides for surviving spouses, but denies these rights to surviving gay and lesbian partners. Gay partners are prevented from obtaining the elective share a surviving spouse is entitled to take from the decedent's estate, which is property that can be used to support the surviving spouse even when the decedent's will makes no provision for such support. Ky. Rev. Stat. Ann. § 392.020; Mich. Comp. Laws Ann. § 700.2102; Ohio Rev. Code Ann. § 2106.01; Tenn. Code Ann. § 31-4-101. Additionally, gay partners are not included within the laws of intestate succession. Ky. Rev. Stat. Ann. § 391.010; Mich. Comp. Laws Ann. § 700.2103; Ohio Rev. Code Ann. § 2105.06; Tenn. Code Ann. § 31-2-104.

In Ohio, James Obergefell, who legally wed his late husband John Arthur on a medically-equipped plane as it sat on the tarmac in Maryland shortly before he lost John to ALS, would simply like John's death certificate to be amended to accurately reflect the fact that John was married to James when he died. *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 975–76 (S.D. Ohio 2013).

Duties. With rights, of course, come responsibilities. Gay couples in these states and others with similar bans are not only prohibited from receiving any of the benefits of marriage, but they are also exempt from any of its responsibilities. Marriage, after all, often

matters most when "bad stuff" happens such as illness, death, or separation. But here, when a gay couple separates, there are no available options for legally sanctioned divorce, alimony, or child support. *See, e.g.*, Ky. Rev. Stat. Ann. § 530.050(3) (duty to provide support for "indigent spouse" or "minor child"); Mich. Comp. Laws Ann. § 552.16 (governs care, custody and support of children after a divorce); Ohio Rev. Code Ann. § 3105.10(A) (divorce only available for those in a "marriage"); Tenn. Code Ann. § 71-3-123 (allowing civil action against deserting spouse or parent).

In addition, in Michigan, Ohio, and Tennessee, gay state employees or officials are not required to disclose information about their partners for conflict of interest purposes. *See, e.g.*, Mich. Comp. Laws Ann. § 487.1511(b) (defining "Relative" for purposes of conflict of interest as "parent, child, sibling, spouse . . ."); Ohio Rev. Code Ann. § 102.02(A)(1) (requiring disclosure by state government officials of names under which a spouse conducts business); Tenn. Code Ann. §§ 2-10-115(a), 2-10-127(a), 2-10-129(a), 2-10-130(a) (requiring disclosures of conflicts of interest related to elected and appointed officials and their spouses).

## IV. Absence of Legitimate Rationales

The thinness of the states' proffered rationales for denying marriage to gay couples further demonstrates that they are nothing more than pretexts for discrimination rooted in stereotypical thinking about a disfavored group. Given that most of Congress' justifications for excluding gay and lesbian couples from the federal definition of marriage (*e.g.*, responsible procreation, caution, respect for the political process, cost-savings) were not sufficient to

justify DOMA in *Windsor*, it is hard to see how the nearly identical justifications offered by Kentucky, Michigan, Ohio, and Tennessee could possibly be sufficient here. *See, e.g.*, *Baskin* v. *Bogan*, 766 F.3d 648, 659 (7th Cir. 2014) (Posner, J.) ("The denial of these federal benefits to same-sex couples brings to mind . . . *Windsor*, which held unconstitutional the denial of all federal marital benefits to same-sex marriages recognized by state law. The Court's criticisms of such denial apply with even greater force to Indiana's law." (citation omitted)).

In other words, the inability of the states defending these laws to offer justifications that are in any way rationally related to advancing legitimate governmental purposes is, in and of itself, an independent reason why these laws must be struck down. It is also further evidence that it was animus, rather than a legitimate governmental interest, that motivated these laws in the first place. *See, e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) (a law is unconstitutional when it "lacks a rational relationship to legitimate state interests" such that it "seems inexplicable by anything but animus toward the class it affects"); *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *Baskin*, 766 F.3d at 666 ("[A]nimus. . . is further suggested by the state's inability to make a plausible argument for its refusal to recognize same-sex marriage.").

The states have asserted that barring gay couples from the right to marry and refusing to recognize the lawful marriages of gay couples performed elsewhere encourages "responsible" procreation among straight couples who can unintentionally become pregnant. But, as is explained in detail in the petitioners' briefs on the merits, "the only rationale that the states put

forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656.

In its decision below, the Sixth Circuit was satisfied that this "responsible procreation" argument was sufficient to justify the challenged state laws under rational-basis review. *DeBoer* v. *Snyder*, 772 F.3d 388, 404–06 (6th Cir. 2014). But the question that the Sixth Circuit asked was whether it was rational to *include* opposite-sex couples within marriage. Instead, the question it should have asked was whether it was rational to *exclude* same-sex couples from marriage. After all, there are at least three different kinds of couples who might qualify for marriage: (1) fertile straight couples, (2) infertile straight couples, and (3) infertile gay couples. Assuming arguendo that the state's *only* interest in marriage is to channel "responsible procreation" (which is clearly not the case in any event), it might make sense to draw a line between the first and second groups. But once the second group is allowed to marry, what sense does it make to draw the line between the second and third groups, who are identically situated for these purposes? After all, it is not as if the second group can "responsibly procreate" any better than the third group.

The other rationales offered by the states are equally deficient. While the states have argued that gay marriage bans satisfy rationality review on the ground that a state might wish to exercise "caution" or "wait and see" before "changing a norm . . . accepted for centuries," *DeBoer*, 772 F.3d at 406, acceding to an aversion to or fear of change by depriving individuals

of constitutionally guaranteed rights is not a legitimate governmental objective. *See Lawrence* v. *Texas*, 539 U.S. 558, 577–78 (2003) (holding that "tradition" is not an acceptable justification for discrimination in any event); *Romer*, 517 U.S. at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (alterations in original) (internal quotation marks omitted)).

Referring to the fact that marriage for gay people has been legal in Massachusetts since 2004, the Sixth Circuit asserted that "[e]leven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage." *DeBoer*, 772 F.3d at 406. But under this logic, when would the clock have run? In 2054, after 50 years? In 2104, after a century? In fact, although marriage between gay couples has been available for more than a decade in Massachusetts, there have been no adverse impacts on divorce rates or other metrics of the stability of marriage. *See* Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, FiveThirtyEight (Jan. 12, 2010, 9:12 AM), http://fivethirtyeight.com/features/divorce-rates-appear-higher-in-states/ (citing government data and noting that divorce rates in Massachusetts went *down* by 21 percent after the state legalized gay marriage).

Moreover, the Sixth Circuit failed to appreciate the true significance of the decades-long emergence of gay couples and families in American life. These relationships and families have not sprung up overnight, as if they were somehow the abstract creation of political activists. Rather, gay couples have

been supporting each other, raising children together, and facing the same quotidian joys and burdens ("in sickness and in health") faced by other married couples for many years. Social science has been studying gay relationships and parenting for decades. *See, e.g.*, Brief of *Amicus Curiae* American Sociological Association in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (No. 12-144) (2013), *United States* v. *Windsor*, 133 S. Ct. 2675 (No. 12-307) (2013); Brief of the American Psychological Association et. al. as *Amici Curiae* on the Merits in Support of Affirmance, *United States* v. *Windsor*, 133 S. Ct. 2675 (No. 12-307) (2013). States and local governments, in addition to private employers, have been formally recognizing such relationships since at least 1984. *See, e.g.*, Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 Fordham L. Rev. 1699, 1734–35 (1998). No state may excuse its failure to respect the equal dignity of its gay citizens on the ground that it has been caught unaware or that it needs an unspecified amount of additional time to see what might hypothetically happen in an imaginary world where straight couples' stability and sense of self-worth and commitment somehow depend on the continued existence of *de jure* discrimination against gay couples and their children.

Thus, at its essence, the appeal to "wait and see" or "go slow" is really most likely the result of an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (Kennedy, J., concurring). Indeed, "assum[ing] that the Sixth Circuit is right about the voters in [Kentucky, Michigan, Ohio, and Tennessee],

[t]here remains a distinct possibility that it may be wrong about voters elsewhere." *Campaign for S. Equal.* v. *Bryant*, — F. Supp. 3d. —, No. 3:14-cv-818, 2014 WL 6680570, at *33 (S.D. Miss. Nov. 25, 2014).

Some have argued that laws like these are permissible because they enshrine long-held religious or community values. *See, e.g.*, *Amicus Curiae* Brief of the Michigan Catholic Conference in Support of Appellants and Urging Reversal 3–4, *DeBoer* v. *Snyder*, 772 F.3d 388 (No. 14-1341) (6th Cir. 2014). As discussed above, however, those values are themselves changing. The truth is that ours is a nation of many traditions and diverse moral values that must be accommodated. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence*, 539 U.S. at 571 (internal quotation marks omitted). But above all, one cannot enshrine in law discrimination that is constitutionally impermissible, even if many still believe—as more did before them—that the exclusion of gay people from the civic institution of marriage is justified. "The design of the Constitution is that preservation and transmission of religious beliefs . . . is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992); *see also Lawrence*, 539 U.S. at 577–78 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))). Indeed, to the extent that these laws are in fact based on a personal or religious conviction, no matter how sincerely held, that gay men

and lesbians are somehow not worthy of the same treatment as straight people, that is precisely the animus against which the Constitution is designed to protect. *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013); *Lawrence*, 539 U.S. at 571.

Finally, it is not insignificant that petitioner James Obergefell from Ohio merely seeks to have the state correct the facts asserted on the death certificate of his late spouse, John Arthur. The two men were, in fact, married under the law of Maryland where their marriage was performed. It is absurd to contend that refusing to certify that a decedent was "married" to his spouse at the time of his death could possibly influence child rearing, or the willingness of straight couples to marry, or even offend tradition. But actions speak louder than words. Ohio insists that there must be a blank space on Mr. Arthur's death certificate where Mr. Obergefell's name should be. Not content to deny these men the equal protection of the law in life, it also seeks to deny them dignity even in death. Ohio's decision to reject this reasonable request to correct a factually inaccurate death certificate speaks volumes about what is really going on, leaving no doubt that the true motivation behind these laws is constitutionally impermissible animus against gay people.

## CONCLUSION

For all of the foregoing reasons, the Sixth Circuit's decision should be reversed.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

Transcript of Hearing on HJR 24 [/SJR 31]
Before the House Committee
on Children & Family Affairs,
2005 Sess., 104th Gen. Assembly
(Tenn. Feb. 16, 2005)

ROLL CALL: Representatives [Kathryn] Bowers, [Tommie] Brown, [Glen] Casada, [Jerome] Cochran, [Barbara] Cooper, [Jimmy] Eldridge, [Joanne] Favors, [Matthew] Hill, [Curtis] Johnson, [Sherry] Jones, [Brian] Kelsey, [Mark] Maddox, [Debra] Maggart, [Mary] Pruitt, [Donna] Rowland, [Johnny] Shaw, [Larry] Turner, [Nathan] Vaughan, Secretary [Beverly] Marrero, Vice Chairman [Sherry] Jones, Chairman [John] DeBerry

CHAIRMAN: Here.

CLERK: Mr. Chairman you have the forum.

CHAIRMAN: Thank you very much. I want to welcome each and every one of you to this meeting of the Children and Family Committee of the House of Representatives. We have a very good year ahead of us. We hope we have, I think at this point approaching 50 bills to sign for this committee that have a full array of different issues that involve the family and children and adoption and child support and marriage, and, and all those things that have to do with Tennessee families, and we're are looking forward to this

committee, which is a very diverse committee and a very good cross section of the Tennesseans who are part of this committee. Hopefully we can find good resolution to all of the issues that we have before us. We have two bills on the calendar this morning. Are there any comments before we begin from the committee members? Chair recognizes Representative Newton.

NEWTON: Thank you Mr. Chairman, members of the committee. HJR10 is exactly the same as item number two on the calendar. I just want to make one quick statement on this and let's go on with business. Number one is that we had this same resolution up last year and it passed overwhelmingly in both the House and the Senate. Just as it was with the lottery, I truly believe in the people's right and opportunity to express their opinions, their views at the ballot box, and this is an opportunity to do so. There are legal precedents and at least in my personal opinion as a lay person, not as an attorney, that we're in a scenario today that indeed we need to take a long hard look at this issue and let's find some common ground, some middle ground, a remedy, and let's pull together and move forward. So with that explanation Mr. Chairman I'm gonna roll my bill to the heel of the calendar. I would

make that request and allow Representative Dunn to come up along with Representative Litz as well.

CHAIRMAN: Without objection we will roll house bill 10 for the heel. Representative Dunn, Representative Litz you're recognized.

DUNN: Thank you Mr. Chairman, members of the committee. House Joint Resolution Number 24 simply places in the State Constitution the definition of marriage that exists today. Namely that marriage is between a man and a woman. The same language received overwhelming support during the last legislative session and I respectfully ask, for the purpose of discussion, for a motion to send HJR 24 to the Finance Committee.

CHAIRMAN: We have a motion and a second to move House Joint Resolution Number 24 to the floor by way of budget sub. Are there any questions? You are recognized.

SHAW: Thank you Mr. Chairman. Thank you. Let me say to you Representative Dunn, Representative Litz as well as Representative Newton, I am going to support this legislation let me say that upfront. But I have been preaching the gospel for twenty-four years, and if the Bible don't change a man's heart, legislation ain't gonna change it. And I want to make that very clear. I'm

gonna support this, because I know it is a political issue that a lot of folks have gotten all involved in and feel like it's gonna make them a hero or whatever kind of role. But the truth of the matter is that at the end of the day, putting this in the constitution ain't gonna make no difference in the world. The constitution in my humble opinion is a good document just like it is and when you start adding this, then the next thing we gonna have to add something else. And I want to know how in the world are we going to put in the constitution to stop people from sinning when Jesus Christ hasn't stopped them. And you know, I've been here since 2000, and I am just not afraid to say anymore that we need to stop trying to change people's hearts and pass decent legislation and let God do that. And get out and do some witnessing on weekends. If you want somebody's heart to change I think you got to go and sit down and talk to them and you got to do exactly what Jesus said "if I be listening I'll draw men unto me," not legislation. I'm going to support it. I'm going to support it. 'Cause, you know, I am sure there would be a lot of criticism if I didn't, but it is totally ridiculous for us to have to put such a piece of legislation in the constitution because at the end of the day ain't nobody's heart gonna change because of the law. We got a seventy

mile per hour speed limit people still breaking it. We got laws to protect kids, people are still breaking it. We got laws that say you don't get drunk, people are still getting drunk. And I don't understand why in the world we think as human beings who are not even, we're not even perfect ourselves. And I'm thinking about that passage where Jesus said, "If you got any right to throw the rock, you throw the rock" because as long as we have got skeletons in our closet, we gonna have . . . sin is simply sin. Different nature, but sin is simply sin. And I don't think there's anybody in this room perfect enough in their heart to judge another person but Jesus Christ. And I want that to go on record but I am going to support the legislation simply because it's a political hot button and that's all it is. Thank you Mr. Chairman.

CHAIRMAN: Thank you very much for your comments, Representative Shaw. Representative Dunn do you want to make a comment now or do you wish to wait for the other committee members to make their comments?

DUNN: I would like to respond while I'm still recognized.

CHAIRMAN: You're still recognized.

DUNN: You know, I've been carrying this legislation for over a year now and I don't think I've ever mentioned sin and

I've never mentioned you know Bible verse etcetera on this. What I'm just trying to do is put in the constitution the definition of marriage, and that definition came about not because of a reason to go after some group or to be discriminatory. It's just whoever wrote the dictionary looked at it and recognized that there is a unique relationship between a man and woman and they called it marriage. And the only reason that I am here to put it in the constitution, and I share your concern about messing with the constitution, but unfortunately we do have a State Supreme Court that doesn't mind messing with our constitution and going against the will of the people and not including them in their decisions. And if we didn't have that kind of State Supreme Court here in Tennessee, and we've already seen it in Massachusetts, I would not be here with this piece of legislation. I would let state law cover that.

CHAIRMAN: Briefly you may respond. You are recognized, Representative Shaw.

SHAW: Thank you Mr. Chairman. Let me say just one thing. And I hear what you're saying Representative Dunn, and I really respect you for what you are doing. But I think my whole point here is that it doesn't matter whether the Supreme Court or whatever court it is, that we have got to understand that

there are just some things that are not in human hands. God said that "marriage is between a man and a woman" and that's good enough for me. And when God said, "I either live it out by choice or I don't live it out by choice," ain't no legislation gonna change my heart. If I don't think that marriage– and I gotta quit I know–if I don't think that marriage is between a man and a woman, that's just something that's in my heart that I have got to give an account for before God if I don't think that, or if I think it is, that is something that I've got to give an account for. So my point is God has already said this. So are we gonna be greater than God? God said it in the beginning that it was between a man and a woman.

CHAIRMAN: Alright, we are not going to get into a rolling debate at the time, at this moment. Representative Dunn, I know that you are ready to make a response because both of you are very articulate on this issue and I appreciate that. Let's let some of the other members make their comments at this time. We're going to recognize Representative Marrero.

MARRERO: Well Representative Dunn, I'm sure you know that I am opposed to this legislation. I'm opposed to altering the constitution and I'm opposed to doing anything that takes away the rights

from a minority of citizens in our community who are good citizens, who are people who really live and work amongst us and are valuable assets to our community. I've been around for a long time and I am telling you that if you think that this is going to do something to save the family, I just can't imagine what planet you came from. Because the family has been disintegrating for a long, long time and what will help the family is people being able to have jobs to feed their children and people having support from their community. We don't need to have prejudice written into our constitution against any group. I am opposed to it. I will certainly vote against it.

CHAIRMAN: Thank you Secretary Marrero, Representative Bowers you are recognized.

BOWERS: Thank you Mr. Chairman I would like to call the question.

CHAIRMAN: Okay the question has been called for. Well I guess that cuts off all discussion except for that of the sponsor.

DUNN: Thank you Mr. Chairman. I know there have been several comments from people who get quite emotional on this. I think if you read the language of what is before you, you will see that there is not an intent of some type of prejudice. It just sets out a definition that I think for thousands of years

people have recognized and it goes beyond something that is quoted in the Bible or Jesus said or God said, it goes to the heart of public policy. And I think that the state recognizes that it's good for a family to have a mother and a father. That doesn't always happen but I know this committee deals with so many issues to where there's a home and it has no father, or there's a home that has no mother and often times you see bad results from that. And so I think it's good for the state to have a policy that encourages a man and a woman to come together and be the very foundation of our society. And so I would appreciate your support of House Joint Resolution Number 24.

CHAIRMAN: We have House Joint Resolution Number 24 properly deployed. Are you ready to vote? All of you have comments? Assembly, we are going to try this on a voice vote in the beginning unless someone calls for the roll, but we will try this on a voice vote. All in favor of House Joint Resolution 24 going to finance signify by Aye. Aye?

ASSEMBLY: [Together] Aye!

CHAIRMAN: Opposed?

ASSEMBLY: [Together] No!

CHAIRMAN: Ayes I have it. House Joint Resolution 24. Representative Bowers would like to record it as voting no. We have a roll call vote asked. Is there a--I am going

to ask--is there a second for that? There is. Alright we are going to call the roll, call the roll would you give your vote, Aye or Nay on House Joint Resolution 24. Clerk, call the roll.

CLERK: [Roll call responses are largely inaudible.]

CHAIRMAN: Speaker is present and not voting, he is therefore [inaudible] [laughter]. The speaker is on record. [laughter]. Okay, alright. What is the count please?

CLERK: Thirteen Ayes, four Nos, two present not voting.

CHAIRMAN: Okay, the Aye's have it. Resolution passes. House Joint Resolution Number 24 goes out of Children and Family to Finance and Budget Subcommittee. Thank you very much Representative Lizt, Representative Dunn. Representative Newton you are recognized. [inaudible] Alright Representative Newton takes House Joint Resolution Number 10 off notice. Number 10 off notice. Well if I'd known it was going to be this easy, we would have had the commissioner come on before us today. We really thought that there would be a lot more to do than it happened to be so we scheduled a commissioner for next week from the Department of Human Services, he will be before us next week. Any comments from the members of the committee before we conclude our business for today?

Representative Turner, you weren't recognized but you're allowed, since we're finished. Representative Turner, Representative Casada, Representatives, do you have anything to say?

TURNER: I was just going to ask. Last year we talked about the Full Faith and Credit Clause with contracts between states. I just don't know if we have any answers on that but whether its insurance contracts or marriage contracts, whatever, Massachusetts, Hawaii, or whatever, or other states too, I just wondered if we ever got a legal opinion on that.

CHAIRMAN: Alright.

TURNER: So if there's an attorney who knows that, please tell me.

CHAIRMAN: Okay. Representative Casada, anything?

CASADA: Mr. Chairman, I just had a few comments on the debate. I think, like you, feel like this is not political to us. This is how we think we should organize ourselves as a society and we're voting our conscious, period. Thank you.

CHAIRMAN: Not necessarily anything on the bill. Just speaking personally. Anyone else have any personal comments? Representative Vaughn?

VAUGHN: Mr. Chairman, the reason, I just want to make it clear to the committee why

I asked for a roll call on this particular vote. I believe when we have a voice vote it is just that—a voice vote. If we are going to record the votes on a voice vote, if we are going to record those votes, then automatically vote someone one way or the other unless they go and tell the Chair or the secretary as to what their vote is, I believe that's contrary to the vote of a voice vote. A voice vote is exactly that. If people want a recorded vote, then we ought to have a roll call. But we will not do a combination of the two where we have a recorded yes or no on a vote and then at the same time say it's a voice vote. So I just want to be clear as to why I wanted to make sure that we had a clear understanding of where people were on this position. And I bring this up because that occurred last session and I think it's very confusing, particularly in the event you fall on one position or the other and we have a situation where people want to make sure they are recorded one way or the other on these votes, we oughta have voice voting.

CHAIRMAN: Thank you Representative Vaughn. Any other comments, personal for the record? Non-debatable? [inaudible] Thank you.

## APPENDIX B

Note on the method by which the names of amici curiae were collected:

The Human Rights Campaign, which conceived this brief and organized amici curiae, circulated via the internet a draft of this brief to potentially interested individuals comprised of Americans who have an interest in gay couples having the right to marry nation-wide because they themselves are lesbian, gay, bisexual, or transgender ("LGBT"); they have LGBT family members; they have LGBT friends; they own or work for a business that would benefit from LGBT people having the right to marry; or (none of these apply, but) they believe that the U.S. Constitution requires marriage equality. The relevant email and web postings are reproduced on the next page.

Persons who wished to be represented as amici were required to attest that they had read the brief, agreed with its arguments, and wished to be included among those on whose behalf the brief is submitted to this Court. They were also required to verify their name and contact information, that they are 18 years of age or older, that they are a citizen or legal permanent resident of the United States, and that the reason they identified for having an interest in the outcome of this case is true and correct. HRC subsequently contacted by e-mail persons who attested to these facts to confirm that they wished to be included as signatories on the brief. Copies of the electronic database reflecting the complete information provided by amici curiae are on file with counsel of record. Every effort has been made to accurately transcribe the name of each amicus on whose behalf this brief is submitted.

# THE PEOPLE'S BRIEF

**"TIMES CAN BLIND US TO CERTAIN TRUTHS," SUPREME COURT JUSTICE ANTHONY KENNEDY WROTE IN A MAJOR 2003 LGBT RIGHTS OPINION, "LATER GENERATIONS CAN SEE THAT LAWS ONCE THOUGHT NECESSARY AND PROPER IN FACT ONLY SERVE TO OPPRESS."**

When laws and constitutional amendments banning marriage equality were passed, many voters and legislators really were blinded by the times. They did not realize that they knew LGBT people personally. They did not recognize the contributions that LGBT people and their families make—as employees, as neighbors, as part of the social fabric in every community in America. Some saw the LGBT community as strangers, not as people with the same hopes and dreams as anyone else.

In many respects, those oppressive times are behind us. In poll after poll, the broad majority of Americans now support marriage equality. Many people who once opposed it are unafraid to admit their views have evolved. Why? They've simply met LGBT people in their own lives.

In other words, the laws challenged in this case are more than fundamentally unfair. They were also adopted in at a time that utterly failed to take into account LGBT Americans as individuals deserving of dignity. The Court has recognized that dignity throughout its history—most recently in *U.S. v. Windsor*. But recognizing that dignity isn't enough. It's time to leave the blindness of the past behind, and guarantee the equal protection our constitution promises to every American.

## READ THE BRIEF

Read the full text of The People's Brief, a joint effort by the Human Rights Campaign, the nation's largest lesbian, gay, bisexual and transgender civil rights organization, and Roberta Kaplan, the acclaimed civil rights attorney who famously advocated on behalf of marriage equality in *U.S. v. Windsor* in 2013*.

READ THE BRIEF

## SIGN THE BRIEF

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14a

I SWEAR OR AFFIRM THAT I AM AT LEAST 18 YEARS OF AGE

I SWEAR OR AFFIRM THAT I AM EITHER A CITIZEN OF THE UNITED STATES OR A LEGAL PERMANENT RESIDENT OF THE UNITED STATES

I swear or affirm that I am interested in the outcome of this case because (select the one that best applies to you):

- I AM LESBIAN, GAY, BISEXUAL OR TRANSGENDER (LGBT)
- I HAVE LESBIAN, GAY, BISEXUAL OR TRANSGENDER FAMILY MEMBERS
- I HAVE LGBT FRIENDS
- I OWN OR WORK FOR A BUSINESS THAT WOULD BENEFIT FROM LGBT PEOPLE HAVING THE RIGHT TO MARRY
- NONE OF THE ABOVE, BUT I BELIEVE THAT THE U.S. CONSTITUTION REQUIRES MARRIAGE EQUALITY

*Disclaimer: The full text of the 'People's Brief' is at www.thepeoplesbrief.org. The version of the People's Brief available at this website is a substantively final draft, subject to proofreading and/or technical changes before filing. By submitting this form, you swear or affirm that the information that you provided is true and correct and you acknowledge that you will be added as a signatory to the official amicus brief referred to as 'The People's Brief'. You give HRC permission to publish your name in official court filings with the U.S. Supreme Court and also in any promotion of 'The People's Brief' that may be circulated publicly. New signatures collected in connection to 'The People's Brief' will be only used in relation to the amicus brief to the United States Supreme Court and not for other purposes. Thank you for standing with HRC in support of full legal marriage equality.*

- I SWEAR OR AFFIRM THAT I HAVE READ "THE PEOPLE'S BRIEF," AGREE WITH ITS ARGUMENTS, AND WANT TO ADD MY SIGNATURE.

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## ABOUT

The Human Rights Campaign, the nation's largest lesbian, gay, bisexual and transgender (LGBT) civil rights organization, and Roberta Kaplan, the leading civil rights litigator who famously argued *U.S. v. Windsor* before the U.S. Supreme Court in 2013, launched the unprecedented "People's Brief" on marriage equality to the Court.

As the nine Justices prepare to hear oral arguments in four critical marriage equality cases this spring, The People's Brief marks the first time that tens of thousands of like-minded Americans will have the opportunity to have their voices formally heard in a civil rights case of the magnitude. Americans who are LGBT or have LGBT friends, family members, and colleagues can review the content of the brief, and affix their name to a document that will be considered by the highest court in the land.

SIGN THE BRIEF

*To have your name submitted to the Court, all names must be signed by noon February 27, 2015.*

*This brief is a substantively final draft, subject only to any proofreading or technical changes (such as to citations) that may be identified. The final, as-filed brief will be posted here on March 2, 2015.*

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*Thank you for standing up for marriage equality with HRC.*

# THE PEOPLE'S BRIEF

Dear friend,

Thank you for adding your name to The People's Brief, an official document being submitted to the Supreme Court of the United States that will go down in history as illustrating the overwhelming support for nationwide marriage equality.

We are no longer accepting new signatures to this brief and are only days away from officially submitting The People's Brief along with tens of thousands of signatures to the Court, organized by state of residence — and we're thrilled that your signature is one of them!

If you should wish to **remove your name from The People's Brief** to prevent your name from being released on a public document and being on the official court record, you may **fill out a request form [available at this link] before 9:00AM ET on Saturday, February 28th to remove your name from The People's Brief**. Please note that by doing so, your signature will not be recorded in support of the document and your name will not be publicly submitted to the Supreme Court.

On behalf of the millions of Americans that would gain access to equal rights, dignity and legal protections through the recognition of legalized same-sex marriage, we are grateful for your conscious effort to stand on the right side of history.

Thank you from every one of us at HRC!

Your support is important to us. Please contact us here so that we can respond to your questions or comments.
Please do not reply directly to this email.

If you would like to unsubscribe from a specific Human Rights Campaign list, or update your account settings, you can visit your Subscription Management Page.

blackbaud

THE PEOPLE'S BRIEF

## The People's Brief Removal Request

**If you should wish to remove your name from The People's Brief to prevent your name from being released on a public document and being on the official court record, you may fill out the request form below before 9:00AM ET on Saturday, February 28th.**

**Please note: be sure to use the same email address that you originally used when you signed The People's Brief in order to help us ensure your information is removed.**

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